179 (2)

No. 10-781

In the Supreme Court of the United States

SCOTT WILKINSON, et al.,

Petitioners,

v.

RICK TORRES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

STEWART A. ESTES
Counsel of Record
KEATING, BUCKLIN & MCCORMACK, INC., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861
sestes@kbmlawyers.com

Attorneys for Respondent Rick Torres

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890 5001

QUESTION PRESENTED

1. Whether Petitioners have failed to present compelling reasons to grant the petition, where the Ninth Circuit's opinion -- that it was objectively reasonable under the Fourth Amendment for a police officer on foot to use deadly force to stop a dangerous fleeing criminal driving a stolen van spinning in a circle in a small yard -- is supported by basic legal principles of qualified immunity and the record, and the petition fails to identify a conflict with a decision of this or any other Court, and merely asks this Court to reweigh the summary judgment record, relying upon baseless representations of the record, and quibbling with immaterial factual issues.

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INTRODUCTION

Petitioners have failed to present any "compelling reasons" for the grant of certiorari. Sup. Ct. R. 10. Petitioners do not argue there is any conflict between the Ninth Circuit opinion and any decision of this Court, or a decision of another federal court of appeals on an important matter under the Fourth Amendment[1]. Nor do they claim the opinion decides any unsettled important question of federal law. Petitioners essentially complain that the court of appeals found their factual assertions on summary judgment to be without basis in the record or immaterial, and that this Court should assert its "supervisory power" and reweigh the record. The Petition should be denied.

STATEMENT OF THE CASE

Factual Misstatements

Petitioners make a number of factual misstatements of the record. These will be addressed in turn below and identified as such in the discussion therein. The Court of Appeals was not misled by Petitioners' creative writing: "Plaintiffs' sanitized version of the incident cannot control on summary judgment when the record as a whole does not support that version." *Wilkinson v. Torres*, 610 F.3d 546 551

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[1] Petitioners do not request that this Court review the dismissal of their Substantive Due Process claim. Their analysis is confined to the Fourth Amendment's objective reasonableness standard and qualified immunity thereunder.

(9th Cir. 2010); *Pet. App.* at 8. Their heavily-edited story "omits the urgency of the situation." *Id.*

Statement of Facts

This is a Civil Rights Act wrongful death lawsuit brought by the parents of a criminal whose dangerous flight from police ended in his being shot by Respondent/Defendant City of Vancouver, Washington police officer Rick Torres. Defendant Torres moved for summary judgment on the basis of qualified immunity. The District Court denied the motion, misapprehending the facts and erroneously holding Defendant Torres to an impossible legal standard of conduct. The Ninth Circuit reversed this decision, and held that the case should have been dismissed.

Petitioners' preposterous assertion is that there was never any danger that justified the use of deadly force, as Wilkinson was just slowly and carefully driving around town. They ignore the undisputed facts that Wilkinson eluded two marked police cars using lights and sirens, ran three stop signs, almost rolled the (stolen) van during a high-speed turn, lost control on another turn and sideswiped a motorist, drove up onto the sidewalk at a busy intersection, then sped at 45-50 MPH down a narrow residential street, and despite being rammed twice by a police car refused to stop, and drove through someone's yard, crashed into a telephone pole, and despite having two officers on either side of the van pointing guns at him, threw it into reverse and accelerated hard in a backwards "donut."

Petitioners illogically assert that the van was moving "away" from the second officer that the

Respondent officer feared would be run over (he thought for a second time). But, they conveniently ignore the fact that the van was traveling in a tight backwards *circle* in the small yard of a home. All four witnesses predicted that the vehicle would come back to within feet of the injured officer. And in fact the van did just as they feared -- striking a vehicle next to the other officer with enough force to cause it damage.

Petitioners next fictitiously claim that there were two distinct volleys of shots with a significant pause in between them, which would have allowed Respondent to not only reevaluate the situation, but to diagnose the criminal suspect's condition and determine whether the risk was eliminated. However, based on Petitioners' own evidence the entire sequence of shots occurred with two seconds. The pause was so brief no other witness even noticed it. The situation was one created entirely by a desperate criminal, whatever his age, and placed Respondent in the position of having to decide in a heartbeat to stop him before he killed or seriously injured someone. Respondent's use of force was lawful, and Petitioners' request that this Court intercede on a run of the mill summary judgment case is not well taken.

Initial Contact at Drug House. On Sunday, May 8, 2005, shortly before noon, Vancouver officer John Key (former defendant and non-party on appeal) was on routine patrol in the City of Vancouver, as was officer Respondent/Defendant Torres. Both were experienced police officers, in marked police vehicles, wearing

standard police uniforms. *Record* 193-249; 81-161; 88; 221.[2]

Officer Key observed an older Plymouth van parked near "a known crack house." *Pet.* at 5. Upon his arrival, one occupant of the van bolted from it and back into the house. Officer Key then confirmed by radio his suspicion that the van was stolen. *Id.* Officer Key exited his vehicle with his weapon drawn to make contact with the driver (decedent Jason Wilkinson). Officer Key stood only 15-20 feet behind the suspect vehicle, and yelled four to five times "Show me your hands!" He yelled so loudly that residents came out of nearby houses. The driver suddenly ducked down inside the car, for upwards of 60 seconds. Officer Key assumed that Wilkinson was reaching for a weapon and that there would be an ambush attempt.

Flight from Police. Suddenly, the driver reappeared turned the engine on and took off at a high rate of speed. He quickly ran a stop sign. The suspect vehicle then turned onto a state highway with Officer Key pursuing, using lights and siren. The suspect vehicle ran another stop sign. Wilkinson's driving placed Vancouver residents at risk of death or serious injury that morning, making wide turns "all over the road." In total, the van ran three separate stop signs, and at one intersection *almost rolled over*. *Record* 88-94; 103; 202-04; 109.

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[2] Citations to the *Record* are to Excerpts of Record ("ER") in accordance with the Ninth Circuit Court of Appeals' protocols. *See* FRAP 30, as modified by Circuit Rule 30-1.

Officer Torres Joins the Pursuit. Respondent Torres heard several things over the radio causing him to be concerned for Officer Key's safety, including the location, the stolen vehicle, and the driver's initial furtive actions which suggested he had a weapon. He responded quickly. Officer Torres fell in behind the two vehicles on the highway, although he had difficulty negotiating moderate traffic.

Wilkinson Loses Control, Strikes a Vehicle and Drives on Sidewalk. The van then attempted a right turn, but because it was traveling at such a high rate of speed it failed to negotiate the corner, and struck a vehicle waiting to turn at the light.[3] The suspect van skidded past that car, into the oncoming lane of travel, and up onto the far sidewalk. *Record* 109; 191-92. If a vehicle had been in that lane, or any pedestrians had been on the sidewalk, they likely would have been injured or killed.

The "PIT" Maneuvers. The officers decided to stop Wilkinson using a "PIT" maneuver -- an acronym for "Pursuit Immobilization Technique." (An officer places his vehicle parallel and slightly behind the suspect vehicle, and bumps the rear quarter panel with the front quarter panel of his vehicle sending the suspect

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[3] Petitioners falsely state that Respondent Torres intentionally rammed the van at this point, causing it to lose control and strike another car. *Pet.* at 6, 21. The record (to which Petitioners conveniently fail to refer) is to the contrary. The eyewitness driver who Wilkinson struck and Officer Torres both undisputedly state that it was Wilkinson's reckless driving alone that caused the sideswipe. The driver testified: "The van missed the correct lane (*i.e.*, east) when it turned *because of its speed*...." *Record* 192 (emphasis supplied).

vehicle into a spin, often causing the engine to stall.) *Pet.* at 6. The suspect van then turned right, off of the arterial onto a narrow residential street. *Wilkinson then accelerated to 45-50 mph down this narrow street. Record* 96. The van had to slow as it approached a "T" intersection. This allowed Officer Torres to strike the rear of the van, spinning it 90 degrees. However, being struck by a marked police vehicle with lights and siren was not enough for to convince Wilkinson to stop. He accelerated again. Officer Torres quickly struck the van again, spinning it sideways. But Wilkinson raced off, again.

Wilkinson Drives through a Yard. The suspect recovered from the second PIT, then drove into the yard of a nearby home. Officer Torres jumped out of his vehicle and followed through the yard on foot. *Pet.* at 7. Officer Key, who was following the van and Officer Torres at a distance, saw both vehicles turn left ahead of him. He was greatly surprised to see the van accelerating across the lawn of the home and coming back towards him. A marked County Sheriff's vehicle had fallen in behind the pursuit. The deputy also saw the van heading towards him through the yard, "coming straight at me very quickly." *Record* 47-59.

Wilkinson Crashes Into Telephone Pole, But Still Does Not Stop. The deputy blocked the van's path back onto the street, so Wilkinson "swerved and ran head-on into the telephone pole." The van was "moving at a pretty good clip," accelerating towards the road. Petitioners' expert witness calculated that the van was traveling at least 12-16 MPH when it struck the pole. It was traveling so fast that its rear tires lifted off the ground when it struck the pole. *Record* 97-98; 211; 51-52; 479.

Officer Key exited his vehicle and approached the van from the driver's side, grabbing the door handle. The driver appeared to be unconscious. Officer Torres saw Officer Key on the driver's side, so he ran up on the passenger side of the vehicle, with his weapon displayed yelling "Show me your hands!" "Show me your hands!" *Record* 51-52; 209-10; 99.

Wilkinson's Wild Backwards "Donut" Endangers All Three Officers. Unfortunately, Wilkinson's dangerous flight from the law had not yet ended. He opened his eyes, threw the van into reverse and stomped on the accelerator. Consistent with his life-threatening conduct thus far, Wilkinson did not stop despite Officer Torres' repeated commands to do so. Instead, he kept accelerating and spinning in a tight circle. *Record* 219.

Petitioners assert that Wilkinson "slowly began to back away" from the pole. *Pet.* at 7. This is again a false assertion, blatantly contradicted by the physical evidence: deep tire tracks in the lawn caused by rapid acceleration, and mud sprayed by the tires. The deputy's vehicle -- and Officer Key -- were so close that the hard acceleration in reverse by the front wheel drive van, threw mud onto both of them. *Record* 52; 237.

All four witnesses agree -- the van immediately began a tight spin. The District Court found: "It is undisputed that the driver accelerated backwards in a counter clockwise arc." *Pet. App.* at 30. Officer Key, who lay (or stood) stunned and helpless at the edge of the lawn in Wilkinson's predicted path, could see the van perform a complete circle in the lawn and travel back towards him in reverse. *Record* 101-02.

Officer Torres Observes Officer Key - on the Other Side of the Van -- Get Knocked to the Ground and Believes he was Run Over. Wilkinson turned the steering wheel to the right, causing the front end to swing sharply towards Officer Key. Officer Torres -- through the van window -- believed that he saw the van strike Officer Key hard, knocking him from sight. "I mean, he was just there and, all of a sudden, I saw him go down." *Record* 210; 99; 52. Officer Torres could hear the tires spinning in the grass, and felt the van begin to move away from his left hand, which had been in contact with the vehicle. The rear end swung towards him and the front end swung towards Officer Key. Key stated that he scrambled for his life to get out from under the van. *Record* 102.[4]

Petitioners presented the declaration of a witness, Anthony Davis, who was sitting in the safety of his car, a short distance from the scene, but in a very different vantage point than was Respondent. Petitioners' entire case is premised on two immaterial assertions by Davis -- that in his *opinion,* Officer Key actually slipped (rather than being struck by the van) getting out of the way of the vehicle; and, that Key was

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[4] Photographs of Officer Key taken immediately after the event show mud and grass smeared on the front and rear his uniform, and his duty belt, from when he was knocked to the ground. *Record* 241; 243; 245; 247. Officer Key fell so hard that the steel radio holder on the duty belt was damaged. *Record* 112. He described the events this way: "I'm just scrambling, trying to get out from underneath the van, so that the van didn't run me over. I ... I though the van was going to run me over." And despite Petitioners' assertion that Key sustained "no injuries," *Pet.* at 8-9, it is undisputed that he later received medical treatment for "left knee strain," and was photographed wearing a knee brace. *Record* 99; 296.

able to get back to his feet (something Torres was unable to see).

These assertions are immaterial because that is *not what Officer Torres perceived, or was able to see* from his partially-obscured vantage point. And even if they were true, this in no way eliminated the danger to Officer Key who was "stunned" and could have been run over whether standing or laying. Nor did it eliminate the danger of the van to Officer Torres or to a nearby deputy. Nor did it eliminate the danger to the public generally if the van was allowed to speed away over the sidewalk and 45-50 MPH down the quiet residential street.

For purposes of qualified immunity, Officer Torres' perspective is the only perspective that matters. From his position, he believed the suspect vehicle struck and then rolled over Officer Key. Petitioners' witness Davis did not believe the van actually impacted Key. Nonetheless, he completely agreed that Officer Key fell "hard" to the ground. However, Davis was on the opposite side of the van as was Officer Torres, and did not have his view of Officer Key obscured by the vehicle.[5] Nor did Davis have to be concerned about being run down as did Respondent.

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[5] Witness Davis confirms that whatever he was able to see about Officer Key's status, Officer Torres could no longer see. Officer Torres was forced to look away from Officer Key and turn with the van as it spun in its tight arc around him. *Record* 216. Davis agrees that Torres had "turned around" to follow the van before he fired his first shot. *Record* 316. Petitioners' unsupported assertions to the contrary should be ignored.

The deputy believed "we've got to stop him from going [escaping] because this guy's you know, he's dangerous." *Record* 419. Officer Torres began yelling "Stop!" "Stop!" "In my mind I was picturing John [Key] just getting chewed up by these wheels." Officer Torres yelled into his radio "Shots fired! Shots fired! Officer Down!" *Record* 213; 218-19; 162.

Ignoring the undisputed evidence, and the laws of geometry, Petitioners' principle argument is that Officer Torres fired when the van was always moving "away" from Officer Key. *Pet.* at 7, 8, 9, 12, 15, 17, 22, 27. But, given the vehicle's *circular* path, this is a baseless assertion. And, in point of fact, the van actually made a circle and came back to exactly where all witnesses feared it would. And if the van had been traveling in a straight line (which no one contends) it would have crashed into the house.[6]

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[6] In one of the more bizarre circumstances of this case, witness Davis failed to see, or hear, the very significant impact of the van into the telephone pole. Inconsistent with all the physical evidence -- and Petitioners' own admission -- Davis claimed that as Wilkinson drove through the yard he saw Officer Key and *carefully slowed down* so as not to hit him, then placed the van in reverse and backed away. "Because the cop was in front of him [Wilkinson], so he was trying to turn around and go the other direction, because he didn't want to run over the cop." *Record* 314. Petitioners do not even pretend that this fantasy to be the truth. Petitioners admit (as the forensic evidence and photographs establish) that Wilkinson crashed into the pole. Their expert accepted the collision as fact. The District Court even based its opinion on their expert witness' testimony. "Mr. Fries also concludes that the van 'impacted the telephone pole at 12-15 MPH.'" *Pet. App.* at 28. No one has ever accepted Davis' patently false assertion -- except the dissenting opinion below. *Pet. App.* at 20 (citing *Record* 314).

All Four Witnesses Agree: The Van's Circular Path Was Back Toward Officer Key. Even according to witness Davis, Wilkinson "was trying to come right back this way towards the cop car [the deputy's vehicle, only a few feet from Key]. And, I even saw it turn like this, to where ... like he was coming this way." *Record* 321. His vehicle was only two to three feet from Officer Key. *Record* 417, 425. The deputy had been standing next to his vehicle, but jumped in it due to his concern that the suspect van would crash into him. *Record* 419, 422. He was so concerned for his safety that he recalls thinking to himself "crap, I'm going to ... going to eat this one." *Record* 425. Even after the van was supposedly "coasting," it struck the deputy's vehicle hard enough to cause damage. *Record* 434.

Lastly, Officer Torres is in agreement with the other witnesses, stating that "The front end [of the van] is starting to kind of spin around pretty fast and I am thinking he is going to spin back like this and right back onto the road where John is." *Record* 219.

Mr. Davis was Very Concerned for Officer Key's Safety. Even from Mr. Davis' perspective, Officer Key appeared to be very concerned that he "could be getting run over here." *Record* 319. Indeed, Davis had the same concern himself. "... **I was, like, worried that the cop [Key] was going to get ran over.**" He directed his attention away from the van to look back at Officer Key **"to make sure the cop wasn't getting ran over."** *Record* 323, 324 (emphasis supplied). Petitioners, who fail to apprise the court of this evidence, simply cannot square their claims with the reality of the incident.

The Van Actually Returns to its Point of Origin and Strikes the Deputy's Car. One undisputed fact wholly undermines Petitioners' fantastic claim that Wilkinson's actions created no risk to anyone -- the suspect van did exactly what officers Torres, Key, the deputy, and witness Davis all believed would happen. It completed its "donut" and rolled back towards the street (striking the deputy's car) only feet from *where Officer Key had been lying*. *Record* 325. To say that the van was "no longer a risk" defies the reality of the moment.

Officer Key Was "Stunned" and Unable to React. The supposed difference in perceptions between Officer Torres and Mr. Davis regarding Officer Key's position (whether he was still on his back, or back up on his feet) is completely immaterial. Whether standing or laying on the ground, Officer Key was injured, stunned, and still in harm's way. Davis states that although Officer Key got back on his feet, he was in a stunned condition, "you know, like in shock." *Record* 317. "Like he wasn't ready to do anything else until he figured out what was going on in his own head." *Record* 316.

And, even if Officer Key had struggled back to his feet "in shock," Officer Torres (on the opposite side of the van, looking in the other direction) was not aware of this. Officer Torres perceived—*through the window as he moved to avoid being run down himself*—that the van struck Officer Key, knocked him down, ran him over, and its circular path would run him over again.

Petitioners would have the Court believe that in the split-second that Officer Torres had to react (to Wilkinson's criminal conduct), he should have been

able to 1) take his eyes off the van, 2) look back and find Officer Key; 3) observe Key long enough to diagnose his physical and mental status, 4) calculate whether the van would miss Key and whether Key would be able to jump out of the van's path. This is unreasonable.

The Undisputed Sequence: The Van Accelerates In Reverse, Officer Key Falls to the Ground, Officer Torres Turns, and Then Shoots. It is not disputed that Officer Torres did not fire his first shot until after the van accelerated in its backwards spin. Mr. Davis confirms that Officer Torres did not begin firing until after Wilkinson began his final escape attempt: "He [Wilkinson], like, backed up and turned around, *and then* the cop was shooting at him as he's trying to get out back this way." *Record* 322 (emphasis supplied).

Petitioners falsely contend that a question of fact exists on the sequence of the events regarding the first shot and when Officer Key fell. However, the record does not support any such claim. They distort Mr. Davis' statement to be that Officer Torres began to fire before Officer Key fell to the ground. But, Mr. Davis said no such thing.

In his interview, Mr. Davis clearly stated that Officer Key fell to the ground on two separate occasions; Petitioners simply conflate these distinct events. "[Officer Key] jumped up to the street and got ... he was out of the way and he was standing there, like in shock, and then, he laid on the ground after that." *Record* 317. It was after the first fall, but before this second fall, that the shots were fired. *Record* 317. Mr. Davis unequivocally stated that Officer Torres did not begin to shoot until after Officer Key fell the first

time. *Record* 318. Again, Petitioners misrepresent the record.

Officer Torres Uses Deadly Force. It was at this point that Officer Torres determined the need to use deadly force to stop Wilkinson from running over Officer Key, whom he last saw laying helpless on the ground. Officer Torres has explained his split-second decision-making in order to prevent Officer Key from being killed. "My major concern was that he was going to run back over John." *Record* 217. Officer Key concurs with Officer Torres' belief. "I believe Officer Torres saved me from serious harm or from maybe being killed if I got caught up underneath that van." Record 108.

A Split-Second Pause Between Shots To Assess. Petitioners claim that Officer Torres fired a first "volley," leisurely spent several seconds examining Wilkinson and the van, and then shot again for no reason. *Pet.* at 8. However, the record does not support any such claim. The "pause" in between shots was so brief that no other witness even noticed it. Davis described it as "Boom, boom, boom, boom." *Record* 317.

Officer Torres believed that his first shots had missed Wilkinson, who seemed completely unaffected. Torres almost "immediate[ly]" began to fire again. (It is in this blink of an eye the petitioners claim a constitutional violation.) Wilkinson was "looking at me and he was just staring right at me." "He just keeps going." *Record* 213. The first volley "had no effect on him." *Record* 214.

Officer Torres was forced to make a split-second decision. He made a quick assessment and determined

that the threat to Officer Key had not been eliminated. He shot again. Officer Torres described this split second as follows:

> And this guy's looking at me and he's not stopping. And I thought, "Did I miss him?" You know. "Or did I shoot, like, across his stomach?" So then, I shot . . . I thought I shot two more times into him. . . . Then, that's when the van kind of straightened out.

Record 214.

Despite their lawyer's argument to the contrary, Petitioners' own view of the evidence establishes that Officer Torres did not begin shooting the second volley in the millisecond after the van began to "slow." Rather, they concede that he shot again *while the van was still accelerating*. Petitioners claim that *three* shots were fired "after there was no longer power in the minivan." *Pet.* at 9. But they also acknowledge that Officer Torres took *four* shots in the second volley. *Pet.* at 8. The first shot of the second volley was obviously taken while Wilkinson still had the accelerator pressed to the floor. Thus, Petitioners' essential constitutional theory is that a police officer who is shooting to eliminate a threat must pause and reassess between every shot, even in a continuous fire situation. No court has ever imposed such an unwieldy "frame by frame" analysis on the use of force in a rapidly evolving circumstance.

Officer Torres went to check on Officer Key, believing that Officer Key had been seriously injured or killed, "and I expected to find him just ruined." Officer Torres approached in a very excited state

asking Officer Key "Are you okay?" He then stated "I thought you were dead." *Record* 214; 102; 106; 108; and; 221.

Two Seconds Elapsed from the First Shot to the Last. Petitioners' strained notion is that Officer Torres should have processed all available information in the heartbeat between the first and second volleys and calculated that the van would "barely miss" Officer Key, or that Key was mentally and physically able to act as a matador and evade the spinning van. (Why a brief moment of deceleration is of any significance given Wilkinson's previous maniacal driving behavior is not explained.) But Officer Torres did not have the luxury of casual reflection. Only two seconds elapsed between his first shot and the last. And as the Circuit Court observed, "there is no evidence that Torres had immediately perceived the deceleration of the van." *Pet. App.* at 12.

The fallacy of their position is amply demonstrated by the forensic investigation conducted by an outside police agency – and undercut by Petitioners' own expert witness. A scale diagram of the scene was made during the investigation. *Record* 496. Using this diagram and other evidence, Petitioners' expert witness opined that the van accelerated in reverse for 25-30 feet at 10 MPH. *Record* 480. At this speed, the 15-foot long van traveled about 15 feet per second, or two car lengths. Using the expert's "glass shards" analysis (broken glass on the lawn is indicative of where shots struck the van), all 11 shots were fired within two car lengths of its travel. In other words,

from first shot to last only two seconds elapsed.[7] There was no time for reflective deliberation.

A Single Word Taken Out of Context, and at Odds with A Dozen Other Clear Statements to the Contrary, Cannot Create an Issue of Fact. Petitioners argue that a supposed inconsistency in Officer Torres' statements creates a question of fact about the reason for the second volley. *Pet. App.* at 13. Petitioners' distorted interpretation of one clause out of two lengthy interview transcripts is: *I shot Wilkinson because he stopped.*[8]

Petitioners' interpretation makes no sense, *even in the context of the sentence itself.* Officer Torres states he shot then paused briefly, saw that Wilkinson

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[7] The dissent below claimed that two seconds elapsed between the first and second volleys. *Pet. App.* at 21. The physical evidence above proves this to be impossible (the entire event took only two seconds), and nothing in the record supports this claim. Judge Marshall came to this conclusion, unaided by any argument, based on a written transcript of when an emergency communications operator, at a remote location, manually time-stamped the officers' radio transmissions that reported the shooting. This record keeping act does not occur in real time. It merely memorialized the radio transmissions of two separate officers, one who stated "Shots fired," and the other "Shots. Code 3." *Id.* This fact shows nothing except that a third person at another location took notes of a radio call, and two seconds later took another note of a separate radio transmission. It is not completely accurate evidence of when the radio transmissions reporting the shooting were made, much less when the shots were actually fired.

[8] Nothing in the record supports the argument that the van "stopped" at this point. Indeed, it continued moving until it struck the deputy's vehicle out on the street.

looking at him and the van was still moving, so he shot again. Officer Torres began this same sentence by stating "I thought what happened was I fired four rounds, **and he kept going** ...." *Record* 213 (emphasis supplied).

Petitioners' strained interpretation is inconsistent with Officer Torres' sixteen (16) other statements on this exact issue that were consistent and clearly to the contrary. *Record* 213; 214; 216; 219; 383; 384. He unequivocally stated over and over that he shot again because Wilkinson did not stop. Torres simply misspoke (or the transcriptionist mistyped). The single out of context word ("had" instead of "had not") cannot be used to create an issue of fact.

The Ninth Circuit explained the illogic of this claim best:

> The single phrase "he had stopped," implying that Wilkinson had stopped before Torres fired the second volley, cannot alone support summary judgment where Torres repeatedly testified – in that same sentence, multiple times during the same interview – that Wilkinson did not stop until after Torres began firing his second volley. *See Scott [v. Harris]*, 550 U.S. [379,] 380 [2007] ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 ... (1986)) (internal quotation marks omitted) (emphasis added)). The quoted sentence from Torres' deposition is ambiguous because a literal reading of the sentence does

> not make sense – Torres states that Wilkinson "kept going" just before he says Wilkinson "had stopped." Therefore, in this context, the phrase "had stopped" is an insufficient basis for the denial of summary judgment. Cf. *Hart v. Parks*, 450 F.3d 1059, 1068 (9th Cir. 2006) (finding that a single, arguably ambiguous statement did not raise a triable issue of fact).

Pet. App. at 11-12.

REASONS FOR DENYING THE PETITION

I. Petitioners Offer No "Compelling Reason" Why this Court Should Grant Certiorari.

As demonstrated above, this is no more than a dispute about the import of certain portions of the district court record. Petitioners advance facts that are not material to the legal issues (that are agreed upon), or are not based on the record. Even if Petitioners were correct, this disagreement does not come close to presenting issues calling for this Court's review.

Petitioners fail to offer any "compelling reasons" (Sup. Ct. R. 10) why this Court should grant their *Petition for Writ of Certiorari*. They do not argue that the Court of Appeals' decision is in conflict with a decision of another Circuit. Nor do they convincingly posit that the decision is even inconsistent with a decision from this Court.[9] Rather, they essentially

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[9] Curiously, Petitioners' principle citations of authority are not to conflicting authority, but to concurring and dissenting opinions of this Court. *Pet.* at 25-26.

complain that this Court should reevaluate the strength of the evidence they presented below and grant them summary judgment. *Pet.* at 17 ("an appellate court [could not] properly decide on this record ..."); and 29 ("unfair summary judgment analysis"). This Court's "decision to grant certiorari is guided by the considerations set forth in Rule 10." *Kansas v. March*, 548 U.S. 163, 184 (2006) (Scalia, J., concurring). Notably, the petition is wholly devoid of any citation to this Court's Rule 10.

Nor is Petitioners' summary judgment argument persuasive. They ask the Court to accept the statement of a witness, but this man almost universally confirmed the three officers' statements. And as the Ninth Circuit correctly held, whatever metaphysical factual discrepancies he might have created were immaterial. Further, "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." Sup. Ct. R. 10.

A. The Ninth Circuit Properly Held that Officer Torres' Actions Were Lawful.

Respondent moved for summary judgment on the basis of the doctrine of qualified immunity. Whether an individual officer is entitled to qualified immunity is a question of law to be decided by the court. In determining whether officers are entitled to qualified immunity, the following two issues are considered. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, "do the facts alleged show that the officer's conduct violated any constitutional right?" *Id.* This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity

protects "all but the plainly incompetent or those who knowingly violate the law").

And second, assuming that a violation can be made out based on a favorable view of the plaintiff's allegations, whether the right allegedly violated was *clearly established* at the time.[10] The Ninth Circuit did not reach the second issue as it held Officer Torres' actions to be reasonable as a matter of law. *Pet. App.* at 13.

B. The Fourth Amendment Reasonableness Standard: From the Perspective of the Reasonable Officer on the Scene.

The court in *Graham v. Connor*, 490 U.S. 386, 394 (1989), set forth the standard of "reasonableness" under the Fourth Amendment as to uses of force. The test an objective one, in light of the facts and circumstances confronting the officer.

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.
> * * *
> The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and

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[10] While the questions remain the same, *Saucier's* "rigid order of battle" was recently revised. *Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct. 808 (2009). The mandatory two-step framework was replaced with a discretionary approach as to which question is considered first.

> rapidly evolving—about the amount of force that is necessary in a particular situation.

Graham, supra, at 396-97 (citations omitted). Of these *Graham* use of force factors, "the most important single element" is "whether the suspect poses an immediate threat to the safety of the officers or others." *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994).

The objective reasonableness standard likewise applies to the use of deadly force. In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court stated that where the officer has probable cause to believe that the suspect poses a threat of serious physical harm or death, *either to the officer or to others*, it is not unreasonable to seize the suspect by the use of deadly force. *Garner, supra*, at 10.

This standard, appropriately applied by the Court of Appeals, renders Officer Torres' actions lawful. Petitioners endorse this rule, but then ignore it and ask the Court to view the incident from the perspective of a witness -- who was in a different physical position than the officer -- and who observed both less and more than did the officer. Petitioners compound the problem by advancing facts that are not material to the issues or, on occasion, simply made up by misstating the record.

Here, Wilkinson's outrageous conduct posed a threat of serious injury (1) to Officer Key (who Officer Torres last saw lying helpless on the ground, regardless of what Mr. Davis was able to observe from the opposite side of the van); (2) to Officer Torres, whether standing or on the ground; (3) to a deputy

sheriff standing outside his car next to Officer Key; and (4) to nearby residents and local motorists if he escaped.

Many courts of appeal (which Petitioners fail to acknowledge) have uniformly held that under the Fourth Amendment an officer may act mistakenly, but reasonably, when he is given only a brief period of time in which to perceive and react to a potential threat.[11]

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[11] *See, e.g., Robinson v. Arrugueta*, 415 F.3d 1252, 1256 (11th Cir.), *cert. denied*, 546 U.S. 1109 (2006) (officer forced to make a "split-second decision" with a slow moving vehicle approaching him, had less than three seconds "to react to what he perceived as a threat of serious physical harm from [the driver]." Even if, in hindsight, the officer actually could have escaped the slow-moving vehicle's path unharmed, it was not unconstitutional for him to reasonably but mistakenly use force. Experience shows that "reconsideration [after the uncertainty and the excitement of the moment have past] will nearly always reveal that something different could have been done if...the future [was known] before it occurred." (quoting, *Carr v. Tatangelo*, 338 F.3d 1259, 1270 (11th Cir. 2003)); *Hathaway v. Bazany*, 507 F.3d 312, 322 (5th Cir. 2007) (no constitutional violation for the shooting based on the circumstances that confronted the officer, including the limited time available to respond. "Given the extremely brief period of time an officer has to react to a perceived threat like this one, it is reasonable to do so with deadly force. It is this brevity, and the coordinate rapid response that it demanded from [Officer] Bazany, that is the distinguishing factor in this case. * * * That his decision is now subject to second-guessing -- even legitimate second-guessing -- does not make his actions objectively unreasonable given the particular circumstances of the shooting." (citation omitted); and, *McLenagan v. Karnes*, 27 F.3d 1002, 1007-08 (4th Cir.), *cert. denied*, 513 U.S. 1018 (1994) (officer shot the wrong person in a rapidly moving situation. "We will not second-guess the split-second judgment of a trained officer merely because that judgment turns out to be mistaken, particularly

Petitioners claim that "alternative courses of action were available" to Officer Torres, *Pet.* at 19. But this argument is at odds with this Court's repeated admonition that the Fourth Amendment does not require the police to use the least-restrictive alternative to effect a search or seizure. *Atwater v. City of Lago Vista*, 532 U.S. 318, 350-51 (2001). Rather, all that is required is that the use of force employed was "reasonable." *Graham*, 490 U.S. at 396.

Additionally, their examples are absurd. First, "shooting out the minivan's tires" is dangerous procedure has been outlawed for years by law enforcement agencies. Second, "abandoning the chase" places neighborhood pedestrians and bicyclists, and the motoring public at substantial risk, something that officers need not do. *Brosseau v. Haugen*, 543 U.S. 194 (2004); and, *Scott v. Harris, supra.* And lastly, their vague proposal of "otherwise disabling the vehicle with non-deadly force" is little more than an invocation of *deus ex machina*.

Accepting the issue presented by Petitioners would essentially require this Court to become embroiled in the mundane task of reviewing hundreds of pages of the record and reweighing the "facts" claimed by Petitioners, which in truth are immaterial or unsupported by the record, or both.

But, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical

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where inaction could have resulted in death or serious injury to the officer and others.").

doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986) (footnote omitted). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986).

C. Officer Torres Was Entitled To Qualified Immunity: *Brosseau v. Haugen* Controls.

Even if it could be argued that a material question of fact existed concerning the reasonableness of Officer Torres' actions, at worst he committed a reasonable mistake as to Wilkinson's continuing risk to himself, other officers, and the public. He would be entitled to qualified immunity.

Qualified immunity "acknowledge[s] that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Saucier*, *supra* at 205. For example, "if an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." *Id.*[12]

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[12] The Fourth Amendment "does not require omniscience." *Elliott v. Leavitt*, 99 F.3d 640, 644 (1996), *reh'g denied*, 105 F.3d 174 (4th Cir.), *cert. denied*, 521 U.S. 1120 (1997). All that is required to justify deadly force is a "sound reason to believe that the suspect poses a serious threat to [an officer's] safety or the safety of others. Officers need not be absolutely sure, however, of the

Only one year before this 2005 incident, this Court addressed a factually similar case. *Brosseau v. Haugen, supra*, controls here. The split-second decision presented to Officer Torres in the instant matter was very similar to that presented to the officer in *Brosseau*:

> Whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.

Brosseau, supra at 200.

The officer pursued a criminal suspect on foot who jumped into his car and began to flee, despite her verbal commands to stop. The suspect began to accelerate out the driveway with two cars parked on the street at the front of the driveway, and other officers approaching on foot from the other side of a building. The officer shot the suspect in the back as he drove away:

> ...fearful for the other officers on foot who [she] believed were in the immediate area, [and] for the occupied vehicles in [Haugen's] path and for other citizens who might be in the area."

Brosseau, supra at 197 (*quoting, Haugen v. Brosseau*, 339 F.3d 857, 865, *amended*, 351 F.2d 372, 390-91 (9th Cir. 2003), *rev'd*, 543 U.S. 194 (9th Cir. 2003)).

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nature of threat or the suspect's intent to cause them harm—the Constitution does not require that certitude precede the act of self protection." *Id.* (emphasis supplied).

In reviewing other similar cases -- which had been decided both for and against police officers -- this Court observed:

> These three [circuit court use of force] cases taken together undoubtedly show that this area is one in which *the result depends very much on the facts of each case*. None of them squarely governs the case here; they do suggest that Brosseau's action fell in the "hazy border between excessive and acceptable force."

Id. at 13 (*quoting, Saucier v. Katz*, 533 U.S. at 206) (emphasis supplied)). The Court then concluded "the present case is far from the obvious one where *Graham and Garner* alone offer a basis for decision." *Id.* at 199.

If the right at issue were not clearly established in 2004 *Brosseau*, it certainly was not clearly established in 2005 here. From Officer Torres' perspective, it was certainly reasonable to use force to stop the criminal's dangerous actions. Even if he were *mistaken* about the need to use force, his perception was a reasonable one.

Petitioners advance the very same argument this Court refused to accept in *Brosseau* -- an officer's supposed mental ability to instantly process the probability that the fleeing criminal can maneuver a vehicle back onto the street, through a narrow space, without hitting other people. Petitioners assert that Officer Torres should have been able to immediately determine that Officer Key was not in substantial danger because the van "would have had to avoid both the telephone pole as well as [the deputy's] vehicle before it could have threatened Officer Key." *Pet.* at 12 (quoting *Pet. App.* at 41-42).

The Circuit Court in *Brosseau* mistakenly found that the officer there should have been able to instantly calculate that the criminal could safely thread the needle between two parked cars at the end of a driveway as he fled. In almost identical language to Petitioners' arguments here, the lower court had reasoned that "[t]he photographs of the scene show that [the suspect] had more than enough room to escape without hitting anything or anyone." *Haugen v. Brosseau,* 351 F.2d at 390. Note should be made of the fact that the suspect in *Brosseau* was driving forward in a straight line down a driveway, not spinning in reverse on a lawn like Wilkinson.

Standing in the vortex, Officer Torres perceived that the spinning van would come back around and run over his fellow officer. Nor did Officer Torres have the luxury of witnessing the event from the relative safety of a car parked down the street, as did Mr. Davis. Rather, he was within inches of this dangerous maneuver, and *was himself at risk* if he slipped on the wet grass. Petitioners also conveniently ignore the obvious risk from the van to the deputy standing outside his vehicle, and to members of the neighborhood who might have been out for a bike ride or a walk on this pleasant Sunday morning, or a motorist or bicyclist down the road that Wilkinson would crash into if he were not stopped.

Wilkinson had already struck one vehicle, sped through a quiet neighborhood, twice driven over the sidewalk and through a yard, and was not deterred by crashing into a telephone pole, or even by being struck

twice by a police cruiser. To say that Officer Torres should have simply let Wilkinson drive off is absurd.[13]

This Court in *Scott v. Harris* stated "Society...need not (and assuredly does not) accept a....risk posed by reckless motorists fleeing the police." 550 U.S. at 379, n.6. There, like Wilkinson here, the suspect "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." *Id.* at 384.

Let us not forget that Wilkinson had numerous opportunities to avoid this result. It was his repeated decisions to engage in wanton conduct that brought about his tragic end. It is entirely appropriate, when balancing the interests of the perpetrator and the public, to take into account "their relative culpability." *Scott v. Harris, supra.* "It was [the suspect], after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that [the deputy] confronted." *Id.*

Numerous courts have rejected claims alleging excessive deadly force in circumstances involving a lesser risk "to others" than presented by Wilkinson.[14]

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[13] If he had done so, Officer Torres would likely be facing a wrongful death action by the family of whatever innocent victim Wilkinson would have killed in his flight.

[14] *See, e.g., Brosseau v. Haugen, supra*; *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) ("[the officer] could reasonably have believed that the truck would continue to threaten the lives of travelers as it continued speeding down the crowded interstate

Here, the Court of Appeals correctly held that Officer Torres' actions were constitutionally reasonable as a matter of law. Even if it was in error, Officer Torres at most made a reasonable mistake as to the need for the use force.

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highway."); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) ("*In an instant* Officer Schulcz had to decide whether to allow his suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably. ...Mr. Smith had proven that he would do almost anything to avoid capture; Officer Schulcz could certainly assume he would not stop at threatening others."); *Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 486-87 (6th Cir. 2007) (emphasis supplied) ("At the point [the officer] fired his weapon he was faced with the difficult choice: 1) use deadly force to apprehend the suspect who had demonstrated a willingness to risk the injury of others in order to escape; or 2) *allow Williams to flee, give chase, and take the chance that Williams would further injure Sergeant Hoshaw or an innocent civilian in his efforts to avoid capture. Moreover, Miller had only an instant in which to settle on a course of action.*"); *Pace v. Capobianco*, 283 F.3d 1275, 1278 (11th Cir. 2002) (emphasis supplied) (vehicular pursuit in which the suspect drove dangerously, swerving into the path of other cars, "drove through someone's front yard," almost hit a motorist, and then, when blocked in a cul-de-sac, his car "began moving forward." The deputy at this point fired seven times into the car as it kept moving, killing the suspect. Officer entitled to summary judgment *as a matter of law*.); and, *Scott v. Clay County*, 205 F.3d 867, 872-73, 877-78 (6th Cir.), *cert. denied*, 531 U.S. 874 (2000) (the deputy was "confronted with a momentous, split-second, life-or-death decision," and reacted by firing a volley of five rounds toward the driver, then an additional volley of four rounds at the vehicle. Held, the force used was reasonable as a matter of law, "the culprit posed a serious risk of injury to others, which standing alone, reconciled his use of force with Fourth Amendment strictures.").

D. The Instantaneous "Second Volley" is Immaterial.

As discussed above, according to Petitioners' own evidence the total elapsed time from the first shot to the last shot was a mere two seconds, during which the van traveled only two cars lengths. Also according to their own theory, Officer Torres commenced firing the second volley *before* the van began to slow down (of four shots total, only three were after "deceleration").

Officer Torres paused and began to shoot again "immediate[ly]." Witness Davis did not even recognize a pause. Officer Key did not even recall that shots were fired until being told so afterwards. *Record* 102.

Even if the van was slowing down, this is immaterial both legally and factually. From a legal perspective, it ignores the predicament the officer is placed in. As one court remarked, "this is not a case where a dangerous situation evolved quickly to a safe one before the police officer had a chance to realize the change." *Smith v. Cupp*, 430 F.3d 766, 774-75 (6th Cir. 2005).

Nor do Petitioners explain the factual significance to Officer Torres that, for a brief moment, Wilkinson was not accelerating the van. It is undisputed that the van was *still moving* and thus still a danger. Indeed, despite supposedly "coasting," it actually traveled back to within feet of where Officer Key was last seen, and struck a deputy sheriff's vehicle hard enough to damage it.

Was Officer Torres supposed to conclude that based on the van slowing and Wilkinson's hands moving off

the wheel (to grab a gun?), that all was fine now? An injured person can still drive a car. And, how could Officer Torres reasonably believe that the risk was over? Wilkinson could have just as easily stopped and accelerated forward and run over Officer Torres or Key, or paused and then re-accelerated in reverse. Certainly there was nothing in Wilkinson's prior conduct that even remotely suggested he would stop.

The interval between the first and second volleys was so brief, that it appears to have been noticeable only to Officer Torres. In that split second, nothing happened to render the situation immediately safe for the officers in the yard. And even if the van did begin to slow down, he could have accelerated again and then become a risk to the neighborhood and local motorists.

CONCLUSION

In conclusion, Petitioners raise no legal or factual issue which would justify this Court reviewing the Ninth Circuit's opinion, much less address the considerations set forth in Rule 10. Officer Torres' actions were constitutionally reasonable in the emergent situation that he confronted – all of Wilkinson's doing. The cases clearly show that police officers may employ deadly force to end just such a dangerous incident. Wilkinson presented a danger not only to the three officers in the yard, but also to pedestrians and bicyclists in the neighborhood, and to other vehicles. Even if this Court were to reweigh the record and find a question of fact exists on the Fourth Amendment question, Respondent Torres would be entitled to qualified immunity as he at worst made a

reasonable mistake as to the need to use force. The Court should deny the certiorari petition.

Respectfully submitted,

Stewart A. Estes
Counsel of Record
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Ste. 4141
Seattle, WA 98104
206-623-8861
sestes@kbmlawyers.com

Attorneys for Respondent Rick Torres

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